Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No.

76-1327

CHARLES GOODROE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976
No.

CHARLES GOODROE,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled case, entered on February 28, 1977.

OPINIONS BELOW

The decision of the court of appeals below was rendered in a Judgment Order by Circuit Judges Forman, Gibbons and Rosenn (Appendix A, infra 1a). The decision of the district court below, denying post-trial motions, was rendered in an Order by District Judge Huyett (Appendix B, infra 4a).

JURISDICTION

The judgment of the court of appeals below was entered on February 28, 1977 (Appendix A, infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether Section 922(h) of the Gun Control Act of 1968, which makes it a crime for certain classes of persons "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," can be properly applied to a person found in possession of a revolver that at some remote past time had been brought into the State where found and subsequently transferred through an indefinite number of intrastate private transactions.

II. Whether Section 922(h) of the Gun Control Act of 1968, which makes it a crime for certain classes of persons "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," can be properly applied to a person found in possession of a revolver 33 months after it had been brought by a licensed firearm dealer into the State where it was found, and after multiple entirely intrastate transfers among persons not engaged in gun dealing following the initial intrastate retail sale by the firearm dealer who had brought the revolver into the State.

III. Whether the power granted to the Congress by Article I, Section 8(3) of the Constitution: "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes" permits enactment of a federal statute that makes it a crime to receive a firearm

which at any time in the past has moved in interstate commerce, without regard to the length of time that the article had been within a single State, and without regard to the absence of any connection with commerce in the act of receiving.

IV. Where this Court, in 1971, construed the similar "receipt" offenses of Title IV and Title VII of the Omnibus Crime Control and Safe Streets Act so as to preserve a significant difference between the two offenses, by limiting Title IV to receiving firearms as part of an interstate transportation, and where this Court, in 1976, construed the "receipt" offense of Title IV substantially more broadly than indicated in its 1971 decision, by including the first retail transaction within a State after an interstate transportation, does application of Title IV's expanded scope to intrastate events that occurred between 1971 and 1976 deprive a defendant of due process of law through the ex post facto effect of retroactive application of the Court's recent construction?

V. Where the Omnibus Crime Control and Safe Streets Act of 1968 contains two provisions, substantially identical, which make it a crime for a person previously convicted of a serious offense to receive a firearm that had moved in interstate commerce, but which have grossly disparate authorized punishments, does the recognized principle of lenity require that the lesser maximum be applied?

VI. Where a defendant, indicted under the less severe of two essentially redundant federal criminal statutes, fails to accept a plea bargain offered by the Government, and the prosecutor thereupon seeks and obtains a "superseding indictment" charging the offense with a substantially heavier penalty, does the existence of circumstances containing potential for vindictive prosecutorial behavior

render the "superseding indictment" void as a violation of defendant's constitutional right to due process of law, or otherwise require the exercise of this Court's supervisory power?

STATUTES INVOLVED

A(1) Title IV, Section 922(h), of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Section 922(h), provides:

> (h) It shall be unlawful for any person
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> (2) who is a fugitive from justice;
> (3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954): or
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(2) Section 924(a), 18 U.S.C. Section 924(a), provides:

> Penalties
> (a) Whoever violates any provision of this chapter . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

B. Title VII, Section 1202(a), of the Omnibus Crime Control and Safe Streets Act of 1968, 18 App. U.S.C. Section 1202(a), provides:

> (a) Any person who—
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

This is a federal criminal prosecution under the gun control provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, as amended, Pub. L. 90-618, 82 Stat. 1213. Petitioner was originally indicted under Title VII of that Act. This indictment was not prosecuted. A "superseding indictment" was filed under Title IV. Petitioner was tried and convicted under this indictment for a violation of Section 922(h).

The facts of the case are basically simple. A search of petitioner's premises on November 24, 1975, revealed the firearm in question, a Harrington & Richardson .32 caliber revolver, Model 732, Serial Number AL6937. Petitioner had previously been convicted in the Court of Common Pleas of Montgomery County, Pennsylvania, of a felony punishable by imprisonment for a term exceeding one year. Out of these two facts, the Government constructed this federal prosecution under the Omnibus Crime Control and Safe Streets Act.

The original indictment charged in a single count that petitioner "did knowingly and unlawfully receive and possess [the revolver], in commerce and affecting commerce, . . . in violation of Title 18, United States Code Appendix Section 1202(a)(1)." (Appendix C). The cited

Section is in Title VII of the Act. This indictment was filed on December 9, 1975. On February 24, 1976, the Government moved to dismiss this indictment, and the District Court so ordered. (Docket Entries, p. 2)

On the same date, a "superseding indictment" against petitioner was filed. This indictment charged in one count that petitioner "did knowingly and unlawfully receive [the revolver] which had been shipped or transported in interstate commerce . . . in violation of Title 18, United States Code, Section 922(h)." The cited section is in Title IV of the Act.

The "superseding indictment" substantially enlarged the potential sentence that could be imposed upon petitioner if convicted. The maximum sentence of imprisonment authorized under Section 1202(a) of Title VII is two years. The maximum prison term under Section 922(h) of Title IV is five years. The potential of a greater prison sentence being imposed upon petitioner was fully realized in the events that followed. Following conviction, the District Court imposed the maximum permitted prison term of five years.

The developments that occurred between the two indictments were established in a hearing on petitioner's pretrial motion to dismiss the "superseding indictment". On January 10, 1976, the Government offered a plea bargain on the 1202(a) indictment. If petitioner would plead guilty to that indictment, the prosecutor agreed to join with defense counsel in recommending a prison sentence of one year; in addition, the Government would not go forward with prosecution of petitioner on narcotics charges, then under investigation. (H. Tr. 51-52, 55).[1] Three days later, on January 13, 1976, the Government wrote to defense

1. References to "H. Tr." are to the transcript of the pre-trial hearing.

counsel that the plea offer would be withdrawn if not accepted by January 19. (H. Tr. 53-54). The offer was not accepted within that time, and the Government thereafter moved for the "superseding indictment".

The case went to trial on the Title IV indictment. To prove that the revolver "had been shipped or transported in interstate commerce," as required by Section 922(h), the Government established a partial history of the revolver's movements. The prosecution evidence proved that the firearm had been acquired by a licensed gun dealer in Coatesville, Pennsylvania, from a Massachusetts company, on February 21, 1973. (T. Tr. 101).[2] Two years and nine months later, the gun was discovered in petitioner's premises, when the Government searched them on November 24, 1975. There was no evidence that the revolver had ever left Pennsylvania after February 21, 1973. The Government showed that the dealer sold it to a woman who gave a Coatesville, Pennsylvania, address on February 6, 1974. (T. Tr. 95-97, 100).[3] The only other evidence of the history of the gun was a statement, said to have been made by petitioner at the time of the search of his premises, that he had purchased the gun two years earlier from a friend in Northeast Philadelphia who had previously acquired or purchased it in the Harrisburg area. (T. Tr. 52, 53, 68). Despite the passage of thirty-three months since the revolver had been brought into Pennsylvania, and despite an untold number of intrastate transactions that occurred *after* the intrastate retail sale of the gun, the Government maintained that this evidence satisfied the requirements of the statute, and the statute so interpreted

2. References to "T. Tr." are to the transcript of the trial, April 13-19, 1976.

3. Both indictments charged that petitioner committed an offense "sometime after February 13, 1974."

comes within the commerce power of Congress under the Constitution.

The Courts below agreed with the Government's unprecedented extensions of the statute and of the Constitution. Further, the courts below found no occasion to protect petitioner from even the possibility of vindictiveness on the part of Government prosecutors in expanding the scope of potential punishment from two to five years.

REASONS FOR GRANTING THE WRIT

1. *The reach of Section 922(h) of the Omnibus Crime Control and Safe Streets Act is an important question of federal law that has not been, but should be settled by this Court.*

The gun control provisions of the Omnibus Crime Control and Safe Streets Act of 1968 have been among the most actively enforced sections of that Act. Within the gun control provisions, there are two "receipt" offenses that pose unusually difficult problems of interpretation. Already, the meaning of Section 922(h) has been before this Court twice, and the Court has given different readings on the scope of that provision. There remains a major question about this important section that has not been answered. This case poses clearly that vital question of the outer reach of Section 922(h).

The first case to come before the Court was *United States v. Bass*, 404 U.S. 336 (1971). Both the Government and the Court there attempted to make sense of the two "receipt" offenses. The Court rejected the Government theory that the Title VII provision, 18 App. U.S.C. Section 1202(a), should be given a very wide interpretation in order to distinguish it from Section 922(h) in Title IV. The Court,

rejecting the Government argument for an extreme reading of Section 1202(a), declared its considered opinion that this provision, even as narrowly construed, had a broader sphere of application than did Section 922(h).

The first prosecution under Section 922(h) to reach this Court was decided earlier in this present Term. *Barrett v. United States*, U.S. 423 US 212 2d 450 (1976). The Court declined to adhere to the interpretatibn of Section 922(h) indicated in *Bass*. The Court declared that Section 922(h) is not strictly confined to the act of receiving a firearm on arrival from an interstate or foreign shipment.

The critical concept in *Bass* and *Barrett* has been the nexus between the actions of the defendants and interstate commerce. *Bass* held that every prosecution under Section 1202(a) must prove that the forbidden acts of receiving or possessing were "in commerce or affecting commerce," the language of that statute. To avoid redundancy of Section 1202(a) with Section 922(h), the Government had argued that for the lesser offense of Section 1202(a) there should be no need to prove that defendants' actions were in commerce or affecting commerce, but this Court held otherwise.

Barrett held that the act of receiving a firearm comes within Section 922(h) where the defendant had received the gun in the first retail sale of it by a dealer who had brought into the State. The gun had been manufactured in Massachusetts, shipped by the manufacturer to a distributor in North Carolina, and then received by the retailer in Kentucky. The retail sale was entirely intrastate within Kentucky. Significantly, it occurred less than a month after the retailer received the gun into its inventory. Moreover, the defendant's arrest in that case was within an hour after the retail purchase. The Court's opinion emphasizes the importance of the facts of the case:

> "We conclude that §922(h) covers the intrastate receipt, *such as petitioner's purchase here*, of a firearm that previously had moved in interstate commerce." 423 U.S. at 225 (Emphasis supplied).

The question that is before the Court in this petition for certiorari is whether there is any limit to how far *Barrett* extends Section 922(h) into purely intrastate concerns. Petitioner was not involved in the first retail sale of the gun in question when it was brought into Pennsylvania. The revolver was not discovered in petitioner's possession until thirty-three months after the interstate transportation that brought it into the stock of a Pennsylvania firearms dealer.

The theory of the Government, adopted by the courts below, gives a reading to Section 922(h) that is vastly larger than this Court's decision in *Barrett*. The principle of commerce on which petitioner's conviction rests is essentially unlimited in scope. No matter how long after a firearm has come into a State, the commerce requirement of Section 922(h) is asserted to have been met. No matter how many wholly intrastate transfers may have occurred prior to the receipt of the firearm by the defendant, the commerce requirement of Section 922(h) is asserted to have been met.

The movement in this Court's reading of Section 922(h) from the opinion in *Bass* to the decision in *Barrett*, while significant, was not very great on the facts of *Barrett*. Inclusion of the first intrastate retail sale of a firearm that has been moving in commerce was a finite and measured extension from the prior reading that cut off the statute's application with the transaction that brought the gun into the State. The principle espoused in this case to support the conviction of petitioner, by contrast, is an unlimited and irrational extension of the federal statute.

Plainly, this presents an important question of federal law that has not been, but should be settled by this Court. No reported decision of any federal court supports the conclusion reached by the courts below. In *United States v. Cruven*, 478 F. 2d 1329 (6th Cir. 1973), cert. denied, 414 U.S. 866, the Sixth Circuit sustained a conviction under Section 922(h). The gun in that case was lost by a police officer in Kentucky on April 12, 1971. A witness saw a gun that looked like this weapon in defendant's possession in Ohio ten days later. And, on April 30, 1971, eighteen days after the gun's loss, defendant was arrested with the gun in his possession in Ohio. The Court of Appeals found this evidence sufficient to prove that the commerce requirement of the statute had been met. The court noted that there had been no significant passage of time between the interstate transportation and the time of defendant's possession. The court also noted that there had been no intervening intrastate transactions. 478 F.2d at 1334-1335.

The Court of Appeals for the Eighth Circuit, on different facts, held that the commerce requirement had not been proved. In *United States v. Ruffin*, 490 F.2d 557 (8th Cir. 1974), the Eighth Circuit reversed a conviction under Section 922(h). The gun in question had been stolen from an interstate shipment in July 1971. At the time of the theft, the gun had been in the possession of a carrier in Illinois. The gun was found in defendant's possession in Missouri on February 23, 1972, seven months later. In reversing defendant's conviction, the Eighth Circuit compared the proof that has been held to satisfy the commerce requirement in other federal criminal statutes. The court cited four cases in which convictions had been affirmed on proof of facts showing that the defendants had purchased the articles in the first intrastate sale after interstate transportation. Lacking evidence connecting the

defendant in *Ruffin* with the "final step" or "final link" in the interstate transportation, the Court of Appeals reversed the conviction.

Both decisions are fully consistent with this Court's holding in *Barrett*.

Neither *Barrett* nor *Craven*, which upheld convictions under Section 922(h), involved intrusion into intrastate transactions beyond the first retail sale. Those decisions cannot support conviction of the petitioner in this case. Moreover, affirmance by the court below of the conviction of petitioner is flatly in conflict with the reversal of the conviction in *Ruffin*.

The record in this case suggests that the hesitance of the Government to prosecute under Section 922(h) has been altered by this Court's decision in *Barrett*. The Government's unjustifiably expansive reading of this Court's decision presents the possibility of a considerable number of prosecutions based on the most ephemeral connection with some remote interstate transportation. It is obviously desirable for this Court to give definition to the outer reach of Section 922(h) promptly.

The Court has already agreed to a comparable action with respect to Section 1202(a). Lower federal courts could not agree on the breadth of the commerce requirement which was held to apply by this Court in *Bass*. Accordingly, the Court granted the writ of certiorari to review *United States v. Scarborough*, ———F.2d——— (4th Cir. 1976), cert. granted, No. 75-1344, October 4, 1976.

The issues presented by Section 922(h) have always been influenced by the interpretation of Section 1202(a). While *Scarborough* is before the Court for better understanding of the Title VII provision, it is fitting and appropriate for the Court to consider the overlapping section in Title IV.

2. The indefinite expansion of Section 922(h) by the courts below raises a serious question of the constitutionality of this provision under the Commerce Clause.

The basis in the Constitution for Congressional enactment of Section 922(h) of the Omnibus Crime Control and Safe Streets Act is the Commerce Clause of Article I, Section 8(3). While the commerce power as construed by this Court is quite broad, it is not without limits. The indefinite expansion of Section 922(h) on the principle adopted by the courts below poses a serious and unprecedented question under the Commerce Clause.

The statement of the principle that underlies the conviction in this case reveals the constitutional issues: If an object has ever moved in interstate commerce, Congress has the power to make receipt of that object by anyone a federal crime without regard to the time elapsed after the interstate transportation, without regard to the number or character of the intrastate transactions that preceded the receipt in question, and without regard to whether the person charged knew or had reason to know of the interstate transportation.

None of the recent decisions by this Court upholding statutes under the Commerce Clause have contemplated so indefinite an extension of federal power. See, *e.g.*, *Fry v. United States*, 421 U.S. 542 (1975); *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Sullivan*, 332 U.S. 689 (1948).

It is, of course, common practice to interpret statutes to avoid raising constitutional doubts. There is no evidence in the legislative history of Section 922(h) to suggest that

Congress intended to stretch the provision to the constitutional perimeter. The interpretation of Section 922(h) by the courts below goes well beyond the defined limits of the commerce power. If that interpretation is followed, there is no avoiding a serious and unprecedented question under the Commerce Clause.

3. *The interrelationship of the two "receipt" offenses in Titles IV and VII of the Omnibus Crime Control and Safe Streets Act, in light of the judicial constructions of the separate provisions, poses a difficult and important problem of two statutes that are essentially identical but with grossly disparate authorized punishments.*

In the history of application and interpretation of the "receipt" offenses of Section 922(h) and Section 1202(a), efforts to carve out significant independent areas of application have failed. This Court's decision in *United States v. Bass, supra,* substantially reduced the potential scope of Section 1202(a) by requiring that every case have a proven nexus with interstate or foreign commerce. This Court's decision in *Barrett v. United States, supra,* marginally expanded the scope of Section 922(h) by permitting at least the first intrastate retail transaction to come within that provision. The courts below have further broadened Section 922(h)'s purview, certainly to the outer limits of Section 1202(a).

The result is that two sections in the same Act make criminal the receipt of firearms or ammunition by persons convicted of serious offenses. The ambiguity that this result creates is intolerable. On the one hand, it creates a discretion in the prosecutor to select the two year federal offense or the five year federal offense as the basis for an indictment. Such unfettered discretion permits arbitrary and capricious decisions. No system of criminal justice can

permit the differential between a two year offense or a five year offense to rest on such a flimsy basis.

Moreover, even the federal courts have no guidance in the statutes, as they have been construed, that will justify use of the more severe provision in one case and the more lenient in another. The existence of such a legislatively created ambiguity calls for application of the well recognized principle of lenity. *United States v. Bass, supra; Rewis v. United States,* 401 U.S. 808 (1971); *Bell v. United States,* 349 U.S. 81 (1955).

Affirmance by this Court of a conviction under Section 922(h) in *Barrett v. United States, supra,* is not a foreclosure of this issue. The only question addressed by the Court was the interpretation of that section in light of its language and legislative history. There was no decision on the intolerable existence in the same Act of two essentially identical criminal statutes with grossly disparate punishment authorizations.

Two decades ago, this Court granted certiorari when it appeared that a similar problem had arisen under the Internal Revenue Code. The problem was satisfactorily resolved, however, by the conclusion of this Court that the two provisions operated on independent and non-overlapping circumstances. *Achilli v. United States,* 353 U.S. 373 (1957).

The problem is as important and difficult in 1977 as it was in 1957. There is no possibility to construe the two "receipt" offenses to have mutually independent spheres of application. The issue is once again posed whether a principle of lenity shall be used to correct the legislative malformation.

4. *The prosecutorial behavior in this case, seeking and obtaining an indictment under Section 922(h) after*

petitioner failed to accept the prosecutor's offer of a plea bargain to the original indictment under Section 1202(a), represents such a flagrant example of the possibility of vindictiveness as to demand relief under the Due Process Clause, or at the very least to call for this Court to exercise its power of supervision.

This Court is fully familiar with the problem of potential vindictiveness by prosecutors through the state prosecutions that have come before the federal courts through federal habeas corpus proceedings. The most recent example is *Blackledge v. Perry*, 417 U.S. 21 (1974). In such cases, this Court has established a prophylactic rule under the Due Process Clause of the Fourteenth Amendment. The Court does not require that there be an actual showing of vindictive prosecutorial behavior. The mere potential of such behavior in circumstances where a defendant is exercising rights under state law is enough to require constitutional protection.

A stronger case is presented in the prosecution of this petitioner. It is, of course, a federal and not a state prosecution. Therefore, not only do the Due Process constraints of the Constitution apply, but the officials involved are also subject to the supervisory powers of this Court.

The prosecutor has attempted to justify the obtaining of a "superseding indictment" under Section 922(h) on the decision by this Court in *Barrett v. United States, supra.* That version of the events does not really explain the peremptory letter sent by the prosecutor demanding an answer to the plea bargain offer within a few days, since it is not clear that this letter came after news of the *Barrett* decision reached Philadelphia. Nonetheless, the important fact is that the prosecutor without any new information

concerning petitioner's offense unilaterally upgraded the offense charged after petitioner failed to accept an offer of a plea bargain. The sequence of such events unmistakably shows the potential for vindictiveness. "The prosecutor has admitted it." *Hayes v. Cowan,* ——F2d—— (CA6) 1230, 1976.

Petitioner's claim for relief raises a question appropriate for this Court's review. It is grounded on the Constitution. What has transpired is a departure from the accepted and usual course of criminal prosecutions that calls for this Court to exercise its power of review.

CONCLUSION

For the reasons advanced in this petition, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN
Attorney for Petitioner

APPENDIX

APPENDIX A—JUDGMENT ORDER OF COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-2252

UNITED STATES OF AMERICA

v.

CHARLES GOODROE,

Appellant

(D.C. Crim. No. 75-747)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit 12(6)
February 25, 1977
Before FORMAN, GIBBONS and ROSENN, *Circuit Judges*

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Attorney for Appellant

JUDGMENT ORDER

In this appeal from a judgment of sentence on a conviction under 18 U.S.C. §922(h) defendant Goodroe contends:

1. That the superseding indictment should have been dismissed

(a) for prosecutorial misconduct in seeking it in retaliation for the rejection of a tendered plea bargain;

(b) because a change in the government's prosecution policy with respect to 18 U.S.C. App. §1202(a)(1) violated his right to equal protection.

2. That the application of §922 in this case violates the ex post facto clause of the Constitution

3. That a 18 U.S.C. §922 offense was not proved. But see *Barrett v. United States.* 423 U.S. 212 (1976)

4. That 18 U.S.C. §922(h) is unconstitutional as beyond the Congressional commerce power.

We find no merit in these contentions.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court.

s/ John J. Gibbons
Circuit Judge

Attest
s/ Thomas F. Quinn
Thomas F. Quinn. Clerk
Dated: FEB 28 1977

APPENDIX B—ORDER OF UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
CHARLES GOODROE

CRIMINAL ACTION
NO. 75-747

ORDER

NOW, August 12, 1976, upon consideration of the motion of defendant for judgment of acquittal, in arrest of judgment, or for a new trial, and the memoranda of law submitted, IT IS ORDERED that the motion is DENIED; defendant shall report for sentencing on September 13, 1976 at 9:30 A.M., Courtroom 12A.

s/ Daniel H. Huzitt
J.

APPENDIX C—INDICTMENT

REJC:LJS:jr
#75-3190

18 U.S.C. App.
§1202(a)(1)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
CHARLES GOODROE

CRIMINAL NO. 75-747
VIOLATION: Unlawful receipt of a firearm.
FILED: DEC 9 1975

INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

Sometime after February 13, 1974, in the Eastern District of Pennsylvania, CHARLES GOODROE, having previously been in the Court of Common Pleas for Montgomery County convicted of a felony, i.e., burglary, larceny and receiving stolen goods, did knowingly and unlawfully receive and possess a firearm, in commerce and affecting commerce, to wit: a Harrington & Richardson, .32 caliber Revolver, Model 732, Serial Number AL6937.

In violation of Title 18, United States Code Appendix Section 1202(a)(1).

A TRUE BILL:

s/ Elaine M. Koza
FOREMAN

s/ Robert E.J. Curran
ROBERT E.J. CURRAN
United States Attorney

APPENDIX D—SUPERSEDING INDICTMENT

REJC:WWW:vfr
File 75-3190

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
CHARLES GOODROE

CRIMINAL NO. 75-747
Unlawful receipt of a firearm
Filed: February 24, 1976

SUPERSEDING INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

Sometime after February 13, 1974, in the Eastern District of Pennsylvania, CHARLES GOODROE, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, i.e., burglary, larceny and receiving stolen goods in the Court of Common Pleas for Montgomery County, did knowingly and unlawfully receive a firearm which had been shipped or transported in interstate commerce, to wit: a Harrington & Richardson, .32 caliber Revolver, Model 732, Serial Number AL6937.

In violation of Title 18, United States Code, Section 922(h).

A TRUE BILL:

FOREMAN

ROBERT E. J. CURRAN
UNITED STATES ATTORNEY

Supreme Court, U. S.
FILED
JUN 28 1977
MICHAEL RODAK, JR., CLERK

No. 76-1327

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES GOODROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1977. The petition for a writ of certiorari was filed on March 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(h), prohibiting a convicted felon (among others) from receiving any firearm that "has been shipped or transported in interstate or foreign commerce," extends to the receipt of a firearm in an intrastate transaction that occurred after the first retail sale of the firearm following its interstate shipment.

2. Whether, if it does, the statute is constitutional.

3. Whether petitioner's sentence to five years' imprisonment for violating Section 922(h) was improper because his conduct also violated 18 U.S.C. App. 1202(a), which provides for a maximum of only two years' imprisonment.

4. Whether petitioner was denied due process by the return of a superseding indictment.

STATUTES INVOLVED

18 U.S.C. 922(h) provides in pertinent part:

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. App. 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted, as a previously convicted felon, of receiving a firearm that had been shipped in interstate commerce, in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A).

On April 9, 1973, petitioner was convicted in a Pennsylvania state court of burglary, a felony (Tr. 92).[1] On November 24, 1975, during a search of petitioner's residence in Philadelphia, Pennsylvania, pursuant to a warrant, law enforcement officers discovered a .32 caliber revolver (Tr. 36, 48-52). Petitioner was present at the time of the search; he admitted that the weapon was his and that he had purchased it from an individual in Philadelphia approximately two years before (Tr. 52-53, 68). The revolver had been manufactured in Massachusetts, shipped to a Pennsylvania dealer in 1973, and sold to a customer in Pennsylvania in February 1974 (Tr. 80, 97, 101).

ARGUMENT

1. 18 U.S.C. 922(h) makes it unlawful for a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Petitioner contends that Section 922(h) does not apply to him because his intrastate acquisition of the revolver took place after the first retail sale following its interstate shipment.

This claim is foreclosed by *Barrett* v. *United States*, 423 U.S. 212, in which the Court held that Section 922(h) applies, in accordance with its unambiguous language, to all acquisition of firearms by convicted felons, in intrastate as well as interstate transactions, provided there has been an interstate movement of the firearm at some time in the past. Although the specific transaction in *Barrett* was the first retail sale after an interstate shipment of the firearm, petitioner's effort to limit that case to its narrow facts is unpersuasive. The Court approved the jury instruction that

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[1] "Tr." refers to the trial transcript. "S.H. Tr." refers to the transcript of the pretrial suppression hearing.

the interstate commerce requirement of Section 922(h) is satisfied if the firearm at some time in its past has traveled in interstate commerce (423 U.S. at 215); ruled that "the persons Congress classified as potentially irresponsible and dangerous * * * are comprehensively barred by the Act from acquiring firearms by any means" (423 U.S. at 218); and held that the language of Section 922(h), which "is directed unrestrictedly at the felon's receipt of any firearm that 'has been' shipped in interstate commerce" and "contains no limitation to a receipt which itself is part of the interstate movement * * * 'means exactly what it says' " (423 U.S. at 216).[2] See also *Scarborough* v. *United States*, No. 75-1344, decided June 6, 1977, slip op. 6-7.

2. Petitioner also contends that, if Section 922(h) applies to his case, then the statute is beyond Congress' power to enact under the Commerce Clause (Pet. 13-14).

Congress has broad power under the Commerce Clause to regulate the transfer of goods after they have been shipped in interstate commerce. See *United States* v. *Sullivan*, 332 U.S. 689, 698 (Congress may "regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce"). Moreover, Congress may impose criminal sanctions for the purpose of regulating even purely intrastate activities, where the cumulative impact of that class of activities substantially affects interstate commerce. *Perez* v. *United States*, 402 U.S. 146; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241. Where the class of activities is regulated and that class is within the reach of

[2]Petitioner's reliance on *United States* v. *Ruffin*, 490 F. 2d 557 (C.A. 8), is unavailing. *Ruffin* was decided prior to this Court's decision in *Barrett* and was based on the proposition, expressly rejected in *Barrett*, that Section 922(h) applies only when "at the time the [firearm] was received it was part of an interstate transportation" (490 F. 2d at 560).

federal power, courts may not " 'excise, as trivial, individual instances' " of the class. *Perez* v. *United States*, *supra*, 402 U.S. at 154.

Congress has properly found that the possession and receipt of firearms by felons constitutes "a burden on commerce or threat affecting the free flow of commerce."[3] 18 U.S.C. App. 1201. Thus, the regulation of the receipt by felons of firearms that have moved in interstate commerce, whether the receipt occurs in interstate or wholly intrastate transactions, falls clearly within the permissible bounds of the commerce power. See *Scarborough* v. *United States*, *supra*, slip op. 9; *United States* v. *Rosenbarger* 536 F. 2d 715, 718 (C.A. 6); *United States* v. *Day*, 476 F. 2d 562 (C.A. 6); *Mandina* v. *United States*, 472 F. 2d 1110 (C.A. 8), certiorari denied, 412 U.S. 907; *United States* v. *Nelson*, 458 F. 2d 556 (C.A. 5); cf. *Huddleston* v. *United States*, 415 U.S. 814, 833.

3. Petitioner's conviction and sentencing under Section 922(h) was not improper simply because his conduct also violated 18 U.S.C. App. 1202(a), which authorizes a lesser maximum term of imprisonment than Section 922(h). See 18 U.S.C. 924(a). Although the prohibitions of the two sections are directed to some of the same persons, each statute also reaches persons not covered by the other. See *United States* v. *Bass*, 404 U.S. 336, 342

[3]The rational basis for this finding is apparent. See *Heart of Atlanta Motel*, *supra*, 379 U.S. at 258. As the Sixth Circuit observed in *Stevens* v. *United States*, 440 F. 2d 144, 151-152, the unquestionably high rate of recidivism among convicted felons and the widespread use of firearms in the commission of crimes affecting commerce leaves "no serious doubt that the possession of firearms by convicted felons is a threat to interstate commerce." See also *Mandina* v. *United States*, 472 F. 2d 1110, 1113-1114 (C.A. 8), certiorari denied, 412 U.S. 907; *United States* v. *Nelson*, 458 F. 2d 556, 559 (C.A. 5).

n. 9. Moreover, although a felon who receives a firearm that has been shipped in interstate commerce violates both sections (see 404 U.S. at 350), Section 1202(a) is much broader in coverage, encompassing the receipt, possession, or transportation of all firearms "in commerce or affecting commerce." It was not unreasonable for Congress to authorize a lesser penalty for this more broadly defined crime, and petitioner is not immune from prosecution under Section 922(h) simply because his act also happened to violate the proscriptions of a second statute. *United States* v. *Phillips*, 522 F. 2d 388, 393 (C.A. 8); see *United States* v. *Green*, 494 F. 2d 820, 826-828 (C.A. 5), certiorari denied, 419 U.S. 1004; cf. *United States* v. *Beacon Brass Co.*, 344 U.S. 43.

Finally, since both sections were initially enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 228, 236,[4] petitioner cannot argue that Section 1202(a) repealed by implication the more severe penalty provisions of Section 922(h). Cf. *Edwards* v. *United States*, 312 U.S. 473, 483-484. Rather, given the differences in coverage between the two statutes, they "can exist and be useful, side by side." *Edwards* v. *United States*, *supra*, 312 U.S. at 484.

4. Petitioner argues (Pet. 15-17) that he was denied due process because, following his initial indictment under Section 1202(a) and his rejection of a suggested plea bargain, a superseding indictment was returned charging him with violating Section 922(h) and exposing him to the greater punishment authorized by that section. The superseding indictment, however, was returned on

[4]Both 18 U.S.C. 922 and 18 U.S.C. App. 1202 were amended without relevant change by different titles of the Gun Control Act of 1968, 82 Stat. 1213, 1216, 1236.

February 24, 1976, shortly after this Court's decision of January 13, 1976, in *Barrett* v. *United States*, *supra*. Contrary to petitioner's suggestion, the superseding indictment was not sought by the prosecutor to punish petitioner for declining to accept a plea bargain. Rather, as the district court correctly found (see S.H. Tr. 57-58, 97-99), the government was motivated to seek the superseding indictment by the *Barrett* decision, which had made it clear that Section 922(h) was applicable to petitioner's conduct. This factual determination that prosecutorial vindictiveness played no role in this case does not warrant further review.[5]

[5]There is no reason to hold this petition pending the outcome in *Bordenkircher* v. *Hayes*, No. 76-1334, certiorari granted June 6, 1977. The issue in that case is whether a prosecutor may, in order to induce a defendant to accept a plea bargain, threaten to bring an additional indictment for a more serious crime, and then actually bring such an indictment when the defendant persists in asserting his right to go to trial. In *Hayes* the prosecutor explicitly warned the defendant that he would be indicted for a more serious crime if he did not accept the offered plea bargain (see 547 F. 2d 42, 43), and acknowledged that no event "occurred between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial" (*id.* at 44). In the present case, by contrast, no such threat was ever conveyed to petitioner, an intervening event of controlling significance (this Court's decision in *Barrett*) took place, and the district court found that the return of the second indictment was not prompted by the prosecutor's displeasure (if any there was) over petitioner's refusal to accept a plea bargain.. Thus, even if the court of appeals' grant of habeas corpus in *Hayes* is affirmed, there is no reasonable prospect that the outcome of the present case would be affected in any respect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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